

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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Rio Tinto plc,	:	
	:	
Plaintiff,	:	Civil Action No. 14-cv-3042 (RMB)
	:	
v.	:	
	:	
Vale S.A., Benjamin Steinmetz, BSG	:	
Resources Limited, VBG–Vale BSGR	:	
Limited aka BSG Resources (Guinea) Ltd.	:	
aka BSG Resources Guinée Ltd, BSG	:	
Resources Guinée SARL aka BSG	:	
Resources (Guinea) SARL aka VBG-Vale	:	
BSGR, Frederic Cilins, Mamadie Touré,	:	
and Mahmoud Thiam,	:	
	:	
Defendants.	:	
	:	
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**DECLARATION OF VINCENT FILARDO, JR., ESQ.
IN SUPPORT OF DEFENDANTS’ MOTION TO DISMISS
RIO TINTO PLC’S AMENDED COMPLAINT**

I, **Vincent Filardo, Jr.**, declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the following is true and correct:

1. I am an attorney licensed to practice in this State and admitted to practice before this Court. I am a Partner of Mishcon de Reya New York LLP, counsel to defendants BSG Resources Limited (“BSGR”) and Benjamin Steinmetz in the above-captioned action (“Action”). I respectfully submit this Declaration in support of Defendants’ Motion to Dismiss the Amended Complaint of plaintiff Rio Tinto plc (“Rio”) (Dkt. No. 83) (“Amended Complaint” or “AC”), pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6) (“Motion”).¹

¹ The Motion is being brought by defendants Vale S.A. (“Vale”), Steinmetz, BSGR, VBG–Vale BSGR Limited (“VBG-Vale (Guernsey)”), BSG Resources Guinée SARL (“VBG Guinea,” and together with “VBG-Vale (Guernsey),” “VBG Defendants”), and Mahmoud Thiam (“Moving Defendants”).

2. On April 30, 2014, Rio filed a Complaint in the Action against Vale, Steinmetz, BSGR, BSGR Guinea Ltd. BVI, the VBG Defendants, Frederic Cilins, Michael Noy, Avraham Lev Ran, Mamadie Touré, and Thiam (“Complaint”).

3. On June 9, 2014, defendants Steinmetz and BSGR executed Waivers of the Service of Summons in this Action, through their counsel, Mishcon de Reya Solicitors, in London, England. Those Waivers explicitly preserved all defenses and objections to this Action, including defenses and objections to the Court’s jurisdiction. (Dkt. No. 28).

4. On June 26, 2014, the VBG Defendants executed Waivers of the Service of Summons in this Action, through their counsel, Martin J. Auerbach, Esq. Those Waivers explicitly preserved all defenses and objections to this Action, including defenses and objections to the Court’s jurisdiction. (Dkt. No. 45).

5. Defendant Cilins has never appeared in this Action. On January 6, 2015, Rio filed a Request for Entry of Default Against Defendant Frederic Cilins. (Dkt. Nos. 151-52). On January 7, 2015, the Clerk of the Court entered the notice of default against defendant Cilins. (Dkt. No. 153).

6. To date, defendant Touré has not appeared in this Action, and Rio has not filed a request for an entry of default against her with the Court.

7. On August 15, 2014, Rio filed its Amended Complaint in the Action against Vale, Steinmetz, BSGR, the VBG Defendants, Frederic Cilins, Mamadie Touré, and Thiam.

8. On July 29, 2014, Magistrate Judge Peck ordered that Rio’s discovery as to defendants BSGR and Steinmetz be limited to personal jurisdiction, unless and until the Court determines that it has jurisdiction over them. (*See* Dkt. No. 78, July 29, 2014 Hr’g Tr. at 17:23-24, 20:18-22, 27:10-12).

9. In accordance with Judge Peck's July 29, 2014 Order, on August 5, 2014, Rio served its First Sets of Jurisdictional Discovery Requests on Defendants BSGR and Benjamin Steinmetz (Dkt. Nos. 99-12 – 99-13) ("Jurisdictional Requests").

10. In accordance with Judge Peck's July 29, 2014 Order, on September 3, 2014, Defendants BSGR and Steinmetz served their Responses and Objections to Rio's Jurisdictional Requests. (Dkt. Nos. 99-16 – 99-17).

11. At the November 3, 2014 and December 9, 2014 conferences, Magistrate Judge Peck ruled on the scope of discovery as to jurisdictional issues as to BSGR and Steinmetz, including search terms, date range parameters, and document custodians. (Dkt. Nos. 116, 146). Pursuant to Magistrate Judge Peck's Order of December 9, 2014, defendants BSGR and Steinmetz were directed to produce any responsive material to the Jurisdictional Requests by January 16, 2015, including a sworn statement from defendant Steinmetz declaring that he does not and did not "own ... any real estate ... [or] any property of any sort in New York ... within six months around the filing of the complaint in both directions." (*See* Dkt. No. 146, December 9, 2014 Hr'g Tr. at 10:6-11:10).

12. Rio never filed, within fourteen (14) days of the July 29, 2014 conference before Magistrate Judge Peck, or at any later date, any objections to Judge Peck's (i) July 29, 2014 Order limiting discovery of defendants BSGR and Steinmetz to jurisdictional issues, or (ii) November 3, 2014 and December 9, 2014 Orders limiting the scope of such discovery.²

13. On January 16, 2015, defendants BSGR and Steinmetz fully complied with Magistrate Judge Peck's December 9, 2014 Order by producing to Rio: (i) a Declaration by Benjamin Steinmetz, executed on January 13, 2015, refuting the allegations made against him in paragraph 20 of the Amended Complaint, and (ii) all non-privileged documents responsive to the Jurisdictional

² At the July 10, 2014 conference, Magistrate Judge Peck ruled that the parties have "14 days to file objections" to any of his rulings that are on the transcript, which "is always triggered from the time of the conference." (*See* Dkt. No. 71, July 10, 2014 Hr'g Tr. at 16:13-22).

Requests. These documents do not contain any evidence to support Rio's claim that the Court has jurisdiction over defendants BSGR or Steinmetz. Attached hereto as **Exhibit A** is a true and correct copy of the Declaration of Benjamin Steinmetz, executed on January 13, 2015, in London, England.

14. Attached hereto as **Exhibit B** is a true and correct copy of the document produced by Rio on January 28, 2015, bates numbered RT0059826 – RT0059827, to Thiam, which is a Reuters India article entitled "CORRECTED – UPDATE 1-Guinea sets deadline for Rio's ore blocks," dated October 4, 2010.

The VBG Defendants are Not "BSGR"

15. In paragraph 21(d) of the Amended Complaint, Rio alleges that "[t]here is no distinguishing between BSG Resources Limited, VBG Guernsey and VBG-Vale BSGR Guinea," that Rio has "no choice" but to refer to these separate and distinct entities "interchangeably" as "BSGR" and that "[a]bsent discovery, it is near impossible to attribute specific acts to specific entities."

16. In footnote 1 to paragraph 21(d) of the Amended Complaint, Rio cites press releases on a website maintained by BSGR, as the basis for Rio's professed inability to distinguish the VBG Defendants from BSGR. However, a review of that website and the press releases found there, which Rio incorporates by reference into the Amended Complaint, makes those distinctions clear and completely belies Rio's claim that the requisite attribution of specific acts to specific entities is "near impossible".

17. As the website and press releases reflect, prior to April 30, 2010, BSG Resources (Guinea) Limited, a Guernsey corporation, was a separate, wholly-owned subsidiary of BSG Resources Limited (BSGR) and was the sole owner of VBG Guinea, a Guinean limited liability company. (*See* Press Release, "Vale SA and BSG Resources Limited Form Joint Venture" (April 30,

2010), *available at* <http://www.bsgresources.com/media/vale-sa-and-bsg-resources-limited-form-joint-venture/>, a true and correct copy of which is attached hereto as **Exhibit C**).

18. As the website and press releases reflect, as of April 30, 2010, Vale became the majority owner of the VBG Defendants, acquiring 51% of BSG Resources (Guinea) Limited and its wholly-owned subsidiary VBG Guinea. (*See id.*; *see also* Press Release, “Response to BSGR Guinea Press Speculation” (May 9, 2013), *available at* <http://www.bsgresources.com/media/response-to-bsgr-guinea-press-speculation/>, a true and correct copy of which is attached hereto as **Exhibit D**).

19. The website and press releases also reflect that with this change of ownership came a change of control. As of April 30, 2010, Vale assumed management control of BSG Resources (Guinea) Limited and BSG Resources (Guinea). (*Id.*) Thus, as of April 30, 2010, the VBG Defendants went from being a direct and indirect subsidiary of BSGR to be majority owned, and controlled, by Vale.

20. Had Rio done a cursory review of Vale’s public filings with the U.S. Securities and Exchange Commission, Rio would have found additional confirmation of the distinct identity, ownership and control of the VBG Defendants, pre- and post-April 30, 2010. Vale’s public filings, available at the SEC’s website, confirm that, as of April 30, 2010, it acquired a 51% interest in BSG Resources (Guinea) Ltd. and became responsible for management control. (*See* Vale S.A., Report of Foreign Private Issuer (Form 6-K) (Apr. 30, 2010), *available at* <https://www.sec.gov/Archives/edgar/data/917851/000095012310041931/c00017e6vk.htm>, a true and correct copy of which is attached hereto as **Exhibit E**; *see also* Vale S.A., Annual Report (Form 20-F) (Apr. 28, 2011) at 19, *available at* <https://www.sec.gov/Archives/edgar/data/917851/000104746911004222/a2202934z20-f.htm>, a true and correct copy of relevant pages is attached hereto as **Exhibit F**).

21. Discovery that Rio has received further confirms that the VBG Defendants were at all times separate legal entities, distinct from BSGR.

22. On July 28, 2014, Rio advised the Court of its intention to file an amended complaint. (*See* Dkt. No. 76, July 28, 2014 Hr’g Tr. at 8:25 – 9:17.) The Court acceded to that, but cautioned that if Rio amended, and the defendants were to prevail on a motion or application challenging the Amended Complaint, it would be with prejudice and “there won’t be any amendments after that.” (*Id.* at 9:10-12). Rio elected to proceed with an Amended Complaint, and did so without the “[a]bsent discovery” it said it needed to “attribute specific acts to specific entities.” (AC ¶ 21(d).)

23. Rio now has received discovery, and it is fully consistent with the information Rio could have readily obtained through diligent review of publicly available sources. On November 14, 2014, Vale, through its counsel Cleary Gottlieb, made a production of documents to Rio. That production contains a range of documents confirming the publicly recorded distinction between the VBG Defendants and BSGR.

24. With respect to ownership, organizational charts produced by Vale reflect that pre-April 30, 2010, the VBG Defendant then known as BSG Resources (Guinea) Limited was a wholly owned subsidiary of BSG Resources Limited. (Vale-RT 00000903, a true and correct copy of which is attached hereto as **Exhibit G**). Another organizational chart in that production reflects the publicly disclosed ownership percentages post-April 30, 2010 -- BSG Resources (Guinea) Limited was owned 51% by Vale and owned 49% by BSG Resources Limited. (Vale-RT 00000928, a true and correct copy of which is attached hereto as **Exhibit H**).

25. These same organizational charts, which reflect that BSG Resources (Guinea) SARL is a wholly-owned subsidiary of BSG Resources (Guinea) Limited are completely consistent with the information concerning identity, ownership, and control from sources publicly available to Rio,

including the website it incorporates by reference in the Amended Complaint. (Vale-RT 00000927, a true and correct copy of which is attached hereto as **Exhibit I**).

26. As detailed in the documents produced by Vale, on April 30, 2010, Vale entered into a Framework Agreement (“FA”) with BSG Resources Limited (referred to therein as BSGR). (Vale-RT 00000684-814, a true and correct copy of which is attached hereto as **Exhibit J**). The same date, Vale, BSGR and BSG Resources (Guinea) Limited entered into a Shareholders’ Agreement (“SA”). (Vale-RT 00000815-874, a true and correct copy of which is attached hereto as **Exhibit K**).

27. Pursuant to the FA, Vale acquired its publicly announced 51% interest in BSG Resources (Guinea) Limited, and its wholly-owned subsidiary BSG Resources (Guinea) SARL. (FA Recitals A, C, Vale-RT 00000688).

28. The Shareholders’ Agreement also gave Vale its publicly disclosed management control over the business activities of the VBG Defendants. (SA § 5.1, Vale-RT 00000821).

29. Similarly, the Framework Agreement provided for the publicly disclosed name changes of BSG Resources (Guinea) Limited to VBG–Vale BSGR Limited, and BSG Resources (Guinea) SARL to VBG–Vale BSGR Guinea Limited. (FA § 4.8, Vale-RT 00000695). The Framework Agreement also expressly confirms that the term “BSGR” means BSG Resources Limited and specifically excludes the VBG Defendants. (FA Schedule 1, Definitions, Vale-RT 00000725, citing to Vale-RT 00000688).

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 6th day of February 2015 at New York, New York.

/s/ Vincent Filardo, Jr.
Vincent Filardo, Jr.